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Demex Group, Inc. and Laborers' Local Union 393.
Case 33–CA–15956

December 19, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

The Acting General Counsel seeks a default judgment in this case on the ground that Demex Group, Inc. (the Respondent) has withdrawn its answer to the complaint. Upon a charge filed by Laborers' Local Union 393 (the Union) on December 9, 2009, the General Counsel issued the complaint on January 29, 2010, against the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent filed an answer to the complaint. However, by letter dated September 16, 2011, the Respondent withdrew its answer.¹

On September 22, 2011, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on September 23, 2011, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was received by February 12, 2010, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Although the Respondent filed an answer to the complaint on February 12, 2010, it subsequently withdrew its answer. The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allega-

¹ On April 26, 2010, the parties entered into a non-Board settlement agreement and the administrative law judge dismissed the complaint, subject to the Respondent's compliance with the terms of the settlement agreement. On June 8, 2011, the Acting General Counsel filed a motion dated April 20, 2011, requesting that the administrative law judge revoke approval of the settlement agreement and reinstate the charge and complaint because the Respondent failed to comply with the terms of the agreement. The judge granted this motion by order dated June 30, 2011. On September 15, 2011, the Respondent filed a motion to withdraw answer, stating that it "does not intend to mount a defense and therefore wishes to withdraw its Answer."

tions in the complaint must be considered to be admitted as true.² Accordingly, based on the withdrawal of the Respondent's answer, we deem the allegations in the complaint to be admitted as true, and we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Manito, Illinois (the Respondent's facility), has been engaged in the business of demolition construction.

During the calendar year preceding issuance of the complaint, the Respondent, in conducting its business operations described above, received revenues for performance of services valued in excess of \$50,000 from enterprises located in the State of Illinois which, themselves, are directly engaged in interstate commerce and meet the Board's direct inflow and/or outflow standards for exercising jurisdiction.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Ed Fisher	President/Owner
Mark Hoover	Superintendent

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:³

All laborers employed in the geographical areas encompassed by Local Union No. 393, together with any other locals which may come within the Jurisdiction of the Great Plains Laborers' District Council Affiliated with Laborers' International Union of North America AFL–CIO; but excluding all guards, professional em-

² See *Maislin Transport*, 274 NLRB 529 (1985).

³ At the hearing, the Acting General Counsel amended complaint par. 5(a) by striking all local numbers except 393. The Respondent did not object to this amendment.

ployees, and supervisors within the meaning of the Act, and all other employees.

On about August 8, 2007, the Respondent signed a memorandum of agreement to be bound by the collective-bargaining agreement between the Union and the Illinois Valley Contractors Association effective May 1, 2006, through April 30, 2011 (the 2006–2011 collective-bargaining agreement).

The Respondent, an employer engaged in the building and construction industry, as described above, granted recognition to the Union as the exclusive collective-bargaining representative of the unit without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. This recognition was embodied in the Memorandum of Agreement described above.

For the period from August 8, 2007, to April 30, 2011, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.

Since about August 4, 2009, the Respondent has denied it entered into a collective-bargaining agreement with the Union and has failed and refused to adhere to the terms of the 2006–2011 collective-bargaining agreement.

The Respondent engaged in the conduct described above without the Union's consent.

The terms and conditions of employment described above are mandatory subjects for the purpose of collective bargaining.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing, since about August 4, 2009, to adhere to the terms of the 2006–2011 collective-bargaining agreement, we shall order the Respondent to honor the terms of that agreement.⁴ We shall

⁴ Member Hayes would not extend the Respondent's remedial obligation beyond the April 30, 2011 expiration of the parties' contract,

also order the Respondent to make its unit employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

In addition, we shall order the Respondent to make all contractually-required fringe benefit fund contributions, if any, that have not been made since August 4, 2009, including any additional amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).⁵ Further, the Respondent shall reimburse the unit employees for any expenses ensuing from its failure to make any contractually-required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enf'd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to the unit employees shall be computed in the manner set forth in *Ogle Protection Service*, supra, with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Demex Group, Inc., Manito, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Laborers' Local Union 393 (the Union), as the limited exclusive collective-bargaining representative of the unit employees, by denying that it entered into a collective-bargaining agreement with the Union covering employees in the following unit:

All laborers employed in the geographical areas encompassed by Local Union No. 393, together with any other locals which may come within the Jurisdiction of

absent either a claim in the complaint that the contract included an automatic renewal clause or a specific request in the complaint for such a remedial provision. He notes that the hearing transcript attached to the motion for default judgment indicates that the settlement agreement was limited to this contract term.

⁵ To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

the Great Plains Laborers' District Council Affiliated with Laborers' International Union of North America AFL-CIO; but excluding all guards, professional employees, and supervisors within the meaning of the Act, and all other employees.

(b) Failing and refusing since August 4, 2009, to adhere to the terms of its 2006–2011 collective-bargaining agreement with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Comply with the terms of its 2006–2011 collective-bargaining agreement with the Union, including any automatic renewal or extension provisions contained therein.

(b) Make the unit employees whole for any loss of earnings and other benefits they may have suffered as a result of its unlawful conduct, with interest, as set forth in the remedy section of this decision.

(c) Make all contractually-required benefit fund contributions, if any, that have not been made to the fringe benefit funds on behalf of employees in the unit since August 4, 2009, and reimburse unit employees for any expenses ensuing from its failure to make any contractually-required payments, with interest, as set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Manito, Illinois, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by

email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.⁷ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 19, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁷ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Laborers' Local Union 393 (the Union), as the limited exclusive collective-bargaining representative of the unit employees, by denying that we entered into a collective-bargaining agreement with the Union covering employees in the following unit:

All laborers employed in the geographical areas encompassed by Local Union No. 393, together with any other locals which may come within the Jurisdiction of the Great Plains Laborers' District Council Affiliated with Laborers' International Union of North America AFL-CIO; but excluding all guards, professional employees, and supervisors within the meaning of the Act, and all other employees.

WE WILL NOT fail and refuse to adhere to the terms of our 2006–2011 collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL comply with the terms of our 2006–2011 collective-bargaining agreement with the Union, including any automatic renewal or extension provisions contained therein.

WE WILL make our unit employees whole for any loss of earnings and other benefits they may have suffered as a result of our unlawful conduct, with interest.

WE WILL make all contractually-required benefit fund contributions, if any, that have not been made on behalf of employees in the unit since August 4, 2009, and WE WILL reimburse unit employees for any expenses ensuing from our failure to make any required payments, with interest.

DEMEX GROUP, INC.